

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES OF AMERICA,

v.

ZACARIAS MOUSSAOUI,

Defendant,

v.

ALL PLAINTIFFS NAMED IN 21 MC 97,
21 MC 101, AND 03 CV 9849,

Movants-Intervenors.

Criminal No. 01-455-A

INTRODUCTION

In its Motion for Reconsideration of the Court's April 7, 2006 Order Granting Intervenors Access to Discovery Produced to Defense Counsel in this Case Pursuant to Protective Orders ("Motion for Reconsideration") and the Memorandum of Law in support thereof ("Memorandum"), the Government attempts to cast the Intervenors as merely attempting to thwart legitimate civil discovery techniques in favor of an "end-around" approach to obtaining documents currently in the hands of the Government. That is simply not correct. The Intervenors in this case consist of families who lost loved ones on that fateful day in September 2001 and entities who suffered severe property damage and billions of dollars in losses as a result of the horrific terrorist attack of September 11. The Government sought to obtain a death sentence against Zacarias Moussaoui for his alleged involvement in, and fraudulent attempts to hide the existence of, the plot that resulted in the largest terrorist attack ever executed on American soil. What the Intervenors in this case simply seek is truth and accountability. In

pursuit of their legitimate goals, the Intervenors approached this Court to request access to documents that will provide information about the attacks and the events leading up to them. The Government, on the other hand, would argue that because this Court's April 7, 2006 Order was "unprecedented" and **might** "raise[] several extremely serious practical problems" in terms of compliance with the Order that this Court must reconsider whether it truly wants to assist the Intervenors in obtaining access to documents in adherence to the spirit of the Victims' Rights Act, 18 U.S.C. § 3771. Indeed, even if there were no Victims' Rights Act, the victims would have a right to access to non-classified information that bears upon 9/11 and the failures that allowed the terrorists to succeed.

The Government speculates that the Intervenors' requests for specific categories of documents would place an undue burden on the Government with its vast resources by having to undertake the responsibility of properly classifying documents produced to not only Defendant Moussaoui's Standby Counsel but also to Defendant Moussaoui himself. The Government's assertion is tantamount to saying that attorneys representing the interests of the families of victims of 9/11 pose a greater threat to disclosure of sensitive information than Zacarias Moussaoui who has admitted membership in Al Qaeda and his lawyers.

Despite the Government's repeated assertions, the Intervenors have **not** sought information that has been stamped as classified or that has been stamped as Sensitive Security Information (SSI) pursuant to TSA guidelines as these documents are clearly outside the purview of the Court's April 7 Order. For the Government to now argue that documents produced to Moussaoui and his Standby Counsel were not vetted for classification and SSI is mind-boggling. The majority of discovery in the criminal case was completed in 2002, the Government admits

that there has been no subsequent attempt to either classify or denote as SSI any of these documents that were produced to Moussaoui and his Standby Counsel.

As this Court noted in the April 7, 2006 hearing on the Intervenors' motion to obtain access to these very documents, "It's quite extraordinary that TSA has a tougher policy on disclosure than the CIA or the FBI or the NSA...What puts the TSA in a higher category of being able to own information [than] those agencies." Tr. at 20. In this Memorandum of Law, the Intervenors argue that the Government has no basis for bringing this Motion for Reconsideration, that this Court possesses jurisdiction over the Intervenors' requests, that the Victims' Rights Statute affords the Intervenors the legal rights afforded them by the Court in its April 7 Order, and that the Government and TSA have mischaracterized and misrepresented a number of facts in its Motion for Reconsideration. The Government keeps raising obstacles to disclosure of 9/11 information. The Government's motion for reconsideration is part of the effort to block disclosure by another means.

ARGUMENT

I. The Government Failed to Show Any Legal Basis for the Motion for Reconsideration.

The Government has failed to note for the Court or for the Intervenors under what authority it attempts to bring its motion for reconsideration. One may only assume that the motion arises pursuant to Fed. R. Civ. P. 60(b). The Fourth Circuit has stated that "Rule 60(b) does not authorize a motion merely for reconsideration of a legal issue" already decided by earlier Order of the Court. *CNF Contractors, Inc. v. Donohoe Construction Co.*, 57 F.3d 395, 400 (4th Cir. 1995), quoting *United States v. Williams*, 674 F.2d 310, 312 (4th Cir. 1982); see also *DiFelice v. U.S. Airways, Inc.*, 2006 WL 1049164, at *1 (E.D. Va. Apr. 17, 2006). Furthermore, Rule 60(b) sets forth a variety of grounds warranting reconsideration including: (1)

mistake, inadvertence, surprise or excusable neglect; (2) newly-discovered evidence; (3) fraud, misrepresentation, or misconduct of an adverse party; (4) voiding of the underlying judgment; (5) satisfaction, release, or discharge of the underlying judgment or reversal or vacating of a judgment upon which the underlying judgment is based; or (6) any other reason justifying relief from the operation of the judgment. *See* Fed. R. Civ. P. 60(b). The Government fails to cite any appropriate legal basis for its motion for reconsideration.

The government had the opportunity to fully set forth its position, and did so twice; once when it filed its Memorandum of Law in Opposition to Intervenor's Motion for Access as well as at Oral Argument. In fact, as the Court noted at the beginning of the hearing on April 7, 2006, "the government has filed an extensive opposition." Tr. at 4. "Rule 60(b) does not authorize a motion merely for reconsideration of a legal issue." *CNF Contractors, Inc.*, 57 F.3d at 400. Nevertheless, it is precisely this that the Government is attempting to accomplish through its motion for reconsideration.

The Government's stated reason for bringing this Motion for Reconsideration is that "we believe that it not only is unprecedented, but is inconsistent with law, and raises several extremely serious practical problems." Memorandum at 2. Intervenor's do not dispute that the Order is "unprecedented." If there are "practical" problems, Intervenor's counsel will cooperate to solve them. The events of September 11, as well as the situation facing those victims and their survivors of September 11 were "unprecedented," but that fact and practical concerns cannot frustrate the Intervenor's legitimate interests. As President George W. Bush stated in his September 20, 2001 address to a Joint Session of Congress and the American people, "All of this was brought upon us in a single day – and night fell on a different world, a world where freedom itself is under attack." *See* <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html>.

Furthermore, Richard Allen, former National Security Adviser to President Ronald Reagan stated the following regarding Intervenor's litigation in New York, "The process of discovery in this lawsuit on behalf of 9-11 families can lead to a vital contribution to our national security...." In fact, Congress immediately convened and passed the Air Transportation Safety and System Stabilization Act ("ATSSSA") providing the victims of 9/11 with certain unprecedented rights. Section 408(b)(1) of the ATSSSA states, "There shall exist a Federal cause of action for damages arising out of the hijacking and subsequent crashes of American Airlines flights 11 and 77, and United Airlines flights 93 and 175, on September 11, 2001." We have to live and work with the new reality that 9/11 foisted on us all.

Judge Hellerstein, in the Southern District of New York, held that "TSA cannot extend its jurisdiction to intrude on the jurisdiction of this court, and the Constitutional rights of litigants to due process with regard to their advancing their claims against the airlines, the airports, and the aircraft security companies through lawsuits in this court specifically authorized by the ATSSSA." *In re September 11 Litigation*, Nos. 21 MC 97, 21 MC 101 (S.D.N.Y. May 2, 2006) (order denying motion for reconsideration), at 3. Further, Judge Hellerstein has recently held that "in keeping with my obligation to advance these important interests [of the Intervenor's] attempts to avail themselves of the remedy provided to them by the ATSSSA] that I have endeavored to regulate the instant proceedings in such a way as to not render the right of litigation acknowledged by Act of Congress a legal fiction." *In re September 11 Litigation*, 2006 WL 846346, at *8 (S.D.N.Y. Mar. 31, 2006). He has also stressed the importance of "advancing the fundamental right under our Constitution of equal justice under the law and the litigants' valid interest in prompt determination of their cases and controversies." *Id.* So too has this Court taken notice of the uniqueness of the situation at the hearing on April 7, 2006:

This situation is unique not just because there is a general victims statute but because Congress did pass a statute for the victims of September 11. That puts this in a somewhat unique posture, and I'm not sure that the government is actually acting in the full spirit of what Congress intended there.

Tr. at 23.

This is not just under the, the legislation as to victims in general. Congress also set up a special compensation fund specifically for the victims of September 11. And we know that this particular incident is being treated differently....

We all know this is a unique case. So the people within that universe of victims are not just in the general universe of victims of crime. They're in a very special universe because Congress not only set up this compensation fund, but it also gave them a right to opt out of the fund and then to bring litigation....

And so I would think that what Congress had in mind when they, when they passed this legislation was concern that these people have a right to pursue their, their rights as victims to see whether or not there was sufficient negligence or culpability that there would be sources of compensation for them that might be greater than what the government was making available in that fund.

Tr. at 29-30.

Even Mr. Spencer acknowledged on behalf of the Government that "Leaving aside the logistics, concerns, and issues in that, it strikes me you may be right, Your Honor, that plaintiffs in the civil litigation have some right to that, but respectfully, I'm not sure that we down here ought to be deciding that. It strikes me as a decision that ought to be made by Judge Hellerstein in New York." Tr. at 25. The only issue the Government seems to have is whether the remedy should come from this Court or in New York. This would seemingly constitute a strictly legal issue which is not to be addressed in motion for reconsideration in the Fourth Circuit. This argument that New York is the sole jurisdictional loci was rejected by this Court.

II. This Court Possesses Jurisdiction Over the Intervenor's Motion and Holds the Power to Issue the Appropriate Relief

A. Judge Hellerstein and This Court Have Agreed That This Court is a Proper and Equitable Venue to Hear the Intervenor's Motion

Judge Hellerstein – the judge in the Southern District of New York tasked with overseeing the MDL proceedings pertaining to litigation against the airlines and the aviation industry regarding the events of September 11, 2001 – noted in a March 31, 2006, opinion and order that “creation of the TSA did not divest the District Courts of their inherent authority to regulate pre-trial and trial procedures in the cases over which they preside.” *In re September 11 Litigation*, 2006 WL 846346, at *8 (S.D.N.Y. Mar. 31, 2006). This Court similarly and correctly noted at the last hearing:

I do, however, have the control at this point over the discovery that's been at issue in this case, and in terms of the general non-classified discovery, I frankly cannot see what the problem other than logistics would be for the government to make that information available to the plaintiffs' counsel. **There's not a security issue there**, and the government's already amassed that evidence, and it should not be that difficult...I cannot see a principled reason why under the unique situation presented here that can't be produced.

Tr. at 24.

This Court already noted: “to the extent that there is unclassified information which the government has pulled together that is relevant to the discovery requests of these attorneys, I cannot see a principled reason why under the unique situation presented here that can't be produced.” *Id.*

The Government does not disagree but contends that the Intervenor's may be entitled to some of the information but claims that the appropriate place for them to get the information is through civil discovery in the 9/11 Litigation. Intervenor's are not limited to gathering information to one form. The Government quite inartfully noted at the hearing: “there may be

among that [the documents previously produced to Defendant Moussaoui] material that is not sensitive, I don't know, but it seems to me that the avenue for a civil litigant to get that material is to get it through the usual processes, which is civil discovery, Touhy requests, whatever it is if it's from another source, but not to try to get information, a dump of information, not knowing what it is, and the problem of some of it being sensitive security information, some of it being classified or classifiable.” Tr. at 19 (Statement by Ms. Goldman on behalf of the Government).

In its Memorandum, the Government sets forth again its position that “the district judges who are presiding over those cases [September 11 litigation cases] are in the best position by far to manage civil discovery in them.” Memorandum at 29. At the hearing, Ms. Goldman went so far as to say that the “intervenors here are trying to embroil this Court in an issue that it need not get involved with and, indeed, doesn’t really have jurisdiction to address.” Tr at 12.

The issue currently before this Court has nothing to do with the issue of civil discovery in the September 11 litigation. This court is the only place in which Intervenors can seek the documents gathered and produced to Moussaoui and his Standby Counsel. In fact, Judge Hellerstein recognized that fact in his March 17, 2006, order when he ruled that “Any requests ... for access to the letters and other matters referenced in this order should be directed to Judge Brinkema.” *In re September 11 Litigation*, Nos. 21 MC 97, 21 MC 101 (S.D.N.Y. Mar. 17, 2006) (order denying discovery requests), at 2. The Government, both at the hearing and in its papers, contends that Judge Hellerstein’s Order doesn’t really mean what it says, but this Court already rejected that distinction noting that “whether it’s related just to the Carla Martin matter or broader than that, this is not an illogical place to be. Where else is this evidence but here?” Tr. at 30. Indeed, the Government has attempted – via Carla Martin’s employer the TSA – to thwart

the Intervenor's every effort to obtain evidence in the New York proceeding which it already produced before this Court.

B. The Crime Victims' Rights Statute in Conjunction with the ATSSSA Provide the Legal Basis for the Court's Order.

Apart from the equitable concerns regarding jurisdiction vested in this Court to hear the Intervenor's motion, the federal Crime Victims' Rights Act, 18 U.S.C. § 3771, provides in relevant part that crime victims have rights including, but not limited to, "the right to reasonable, accurate, and timely notice of any public court proceeding...involving the crime," 18 U.S.C. § 3771(a)(2); "the reasonable right to confer with the attorney for the Government in the case," 18 U.S.C. § 3771(a)(5); "the right to full and timely restitution as provided in law," 18 U.S.C. § 3771(a)(6); and "*the right to be treated with fairness and with respect for the victim's dignity and privacy.*" 18 U.S.C. § 3771(a)(8) (emphasis added). These rights can be asserted by either the crime victim or the crime victim's legal representative "in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred." 18 U.S.C. § 3771(d)(1),(3).

Your Honor noted at the last hearing that "When we're talking about intervenors, we're normally talking about true third parties to the litigation, but as you know now, under the approach that I believe Congress has taken, the victims of a crime are really not third parties. I mean, *they are now by statute significant stakeholders in the criminal prosecution.*" Tr. at 13 (emphasis added). At least one Court of Appeals has agreed and similarly noted that "The statute was enacted to make **crime victims** full participants in the criminal justice system." *Kenna v. U.S. District Court for the C.D. of Cal.*, 435 F.3d 1011, 1016 (9th Cir. 2006).

The Government disagrees. Ms. Goldman asserted that "it is not my understanding that anything of the Victims' Rights Act gives victims the right to information that's not used at the

trial publicly.” Tr at 13. In its Memorandum, the Government contends that “In sum, nothing in the Victims’ Rights Act itself grants victims any right of access to non-public criminal discovery.” Memorandum at 15. If that were the case, the statute would have no meaning. The media and, in fact, the entire general public is entitled to access to information that’s used publicly at trial. See e.g. *In re Associated Press*, 2006 WL 752044, at *3 (4th Cir. Mar. 22, 2006) (“It is undisputed that there is a right of access to judicial records filed in connection with criminal proceedings”). The Victims’ Rights Act must grant the victims something extra. This Court’s interpretation of the Victims’ Rights Act was appropriate, and the Government has failed to demonstrate that this Court’s interpretation of the Victims’ Rights Act constituted clear error that would warrant reconsideration.

The Intervenors in this case represent a vast majority of the victims of the crimes for which Defendant Moussaoui has been charged. The attorneys representing the Intervenors should be given the same level of access to documents relating to the events of 9/11 that Moussaoui and his Standby Counsel have been afforded. To permit Moussaoui – an admitted member of Al Qaeda who has also admitted in open court his direct affiliation with the 9/11 terrorist plot and conspiracy which resulted in the deaths of family members of the Intervenors here – to have the benefit of the documents but to prevent the victims and their representatives from using the documents in a lawful manner is not in accord with the notion of treating the victims fairly and with respect. There is simply no compelling reason that the Government should be able to use the information to prepare and prosecute one admitted terrorist, allow that terrorist’s lawyers access to much of the information, but still foreclose the victims themselves from having the same information to (1) gain a better understanding of what happened on 9/11 in an effort to obtain truth and accountability for these heinous acts, and to (2) advance their

Congressionally-approved federal cause of action. Failing to provide the Intervenor access similar to what Mr. Moussaoui has been afforded through his attorneys treats the victims of Mr. Moussaoui with less respect than one who has admitted to conspiracy in the worst atrocity to have been inflicted on our nation. The Government fails to demonstrate clear error in this Court's determinations regarding the Victims' Rights Act. Therefore, it has demonstrated no basis for reconsideration of this Court's Order of April 7, 2006.

III. The Government Attempts to Hide Behind SSI Designations to Prevent Intervenor Access to Information

A. The Government Mischaracterizes the SSI Regulations and the TSA's Administrative Privilege.

During the April 7 hearing, this Court registered its dissatisfaction with "the degree to which our government keeps things secret from the American people." *See* Tr. at 22. The President likewise affirmed the important role disclosure of government information occupies, noting that "[t]he efficient functioning of our constitutional democracy depends upon the participation in public life of a citizenry that is well informed." E.O. 13392 (December 14, 2005).

The Government's discussion of SSI is both extremely misleading and very troubling. Although the Government presents SSI to this Court as some sort of talismanic "administrative privilege" that trumps the privilege attaching to sensitive information belonging to other agencies, it is not. As Your Honor pointed out in hearing on April 7, 2006, "As a privilege, it needs not be abused or it can be lost, and I think that's something that agency [TSA] ought to think about." Tr. at 33. The SSI Regulations simply do not give the TSA the power to do what it thinks it can do. First of all, anyone with a statutorily defined "need to know" can be given access to SSI. Under the Regulations, even those without a "need to know" may be granted

conditional access to SSI if the TSA determines “that disclosure of such records or information, subject to such limitations and restrictions as TSA may prescribe, would not be detrimental to transportation security.” 49 C.F.R. § 1520.15(e). Any person who is given access to SSI assumes an obligation to “take reasonable steps to safeguard SSI in that person’s possession or control from unauthorized disclosure.” 49 C.F.R. § 1520.9.

Although the Intervenorors disagree with the Government’s contention that the Intervenorors should not be given access to SSI or classified information, this motion is not about SSI nor is it about classified material. As the Government acknowledges in its memo, this Court “denied Intervenorors’ motion with regard to classified and SSI material” but granted the Intervenorors access to ““*non-sensitive, non-classified materials* the government produced as discovery in this case.”” Memorandum at 8. The Intervenorors seek nothing more than what was ordered despite the Government’s attempts to skew the Intervenorors’ requests for certain categories of documents.¹

That being said, the Government appears to be making the argument that there is a tremendous amount of information which was turned over to Moussaoui and/or his lawyers without being first reviewed for SSI which may in fact contain SSI. It is ludicrous to contend that disclosure of documents which have been provided already to the lawyers representing the man who confessed to having participated in the attack which resulted in the deaths of family members as well as personal injury to Intervenorors would pose some greater risk if turned over to the victims. The Government notes that “while the 302s were redacted for witness protection and privacy concerns, and the documentary evidence was reviewed for relevance to the charges and potential defenses in this case, *no review was undertaken at that time for applicable privileges or statutory protections* available to the Government or the interviewee in a Civil

¹ The Intervenorors also will have access as does the media and the general public to documents and testimony introduced in the Moussaoui trial and presented to the jury.

case.” Memorandum at 4. The Government notes that documents “were produced under a protective order (either for general/particularly sensitive discovery materials, or SSI), but no review was conducted for privileges that might apply to civil litigation.” Memorandum at 5. The Intervenors will commit to abide by protective orders that reasonably address the Government’s concerns.

The Government also acknowledges that it in fact turned over documents which it had received from foreign governments despite the fact that “no review was conducted to determine whether these materials could be released to civil litigants.” Memorandum at 5. The Government then asserts that “since the FBI interviewed many Federal Aviation Administration (“FAA”), airline, airport and other aviation security personnel, and collected documents from them, these 302s and documents *could contain SSI, even though not so marked.*” Memorandum at 5. That assertion is contradicted by the plain wording of very SSI Regulations the Government now seeks to hide behind. The SSI Regulations clearly state that “In the case of paper records containing SSI, a covered person must mark the record by placing the protective marking conspicuously on the top, and the distribution limitation statement on the bottom” on “the outside of any front and back cover including a binder cover or folder” on “any title page” and on “each page of the document.” 49 CFR § 1520.13(a)(1)-(3). “The protective marking is: SENSITIVE SECURITY INFORMATION.” 49 CFR § 1520.13(b). The distribution limitation statement that is supposed to appear on each document in all those places is:

WARNING: This record contains Sensitive Security Information that is controlled under 49 CFR parts 15 and 1520. No part of this record may be disclosed to persons without a "need to know", as defined in 49 CFR parts 15 and 1520, except with the written permission of the Administrator of the Transportation Security Administration or the Secretary of Transportation. Unauthorized release may result in civil penalty or other action. For U.S. government agencies, public disclosure is governed by 5 U.S.C. 552 and 49 CFR parts 15 and 1520.

49 CFR § 1520.13(c). It is not only paper documents which are required by statute to be marked:

In the case of non-paper records that contain SSI, including motion picture films, videotape recordings, audio recording, and electronic and magnetic records, a covered person must **clearly and conspicuously mark the records** with the protective marking and the distribution limitation statement such that the viewer or listener is reasonably likely to see or hear them when obtaining access to the contents of the record.

49 CFR § 1520.13(d).

Since the documents which are classified or SSI should be marked as such, and presumably, should be easily separable from the non-classified and non-SSI documents, it should not be difficult for the government to turn over the non-classified, non-SSI material to the Intervenor in compliance with the Court's order. When the government asked the Court to clarify whether by "classified" she meant "SSI" as well, Your Honor noted: "I'm using the term 'classified' in the broadest generic sense. In other words, the *agency has put a stamp on this information* that it is not publicly available because it is sensitive, secret, top secret. To me, SSI is still a classification of that information, all right?" Tr. at 33. Moreover, the SSI Regulations state that "This part governs the maintenance, safeguarding, and disclosure of records and information that TSA *has determined to be Sensitive Security Information*, as defined in § 1520.5." 49 CFR § 1520.1.

The Government, rehashing an argument made during the hearing on April 7, contends in its Memorandum that the Order is somehow unduly burdensome: "even excluding classified documents and SSI, reviewing approximately two million pages of documents to isolate and segregate privileged information imposes an extraordinary burden on the government." Memorandum at 25. At the hearing, Ms. Goldman stated:

I mean, it sounds to us like there is a huge volume of information here, and you are asking the government to undertake to do a review to take out all the SSI, to remove all the classified information, and then do all this work on behalf of

Plaintiffs in order to find the things that were given over that are not classified or SSI. Is that what you are suggesting?

Tr. at 26. Your Honor responded by stating “It’s already been done. You don’t keep classified information with your non-classified. It’s already physically separate if it’s being done correctly.” *Id.*

Now, the Government amazingly appears to be arguing that it would first need to review each and every document produced to confessed Al Qaeda terrorist Moussaoui for retroactive classification or privilege purposes. The vast majority of these documents were produced by 2002. Specifically, in response to a motion brought by Defendant Moussaoui in 2002, the Government commented that it “has provided the vast majority of the 302s generated in this case” and that “contrary to standby counsel’s representation, our estimate is that we provided nearly 85% of the discovery CDs and audio and video tapes on or before June 1, 2002.” Government’s Response to Standby Counsel’s Pleading Regarding Discovery, Docket #339, filed July 16, 2002. In fact, the Government goes on to point out, the reason that the volume of material which had been produced was so great was a result of the Government’s decision “to provide more materials than the law required us to produce at this time. For example, we estimate that we have provided more than 150,000 FBI ‘302’ reports to date (all electronically copied and searchable), even though we are not required to produce most of this material.” *Id.* In fact, the Government noted, “we informed defense counsel that if no agreement could be reached, *we would err on the side of disclosure.*” *Id.*

Nevertheless, the Government argues before this Court that many documents were never reviewed by all the appropriate agencies before they were sent to Moussaoui and/or his attorneys and imply that the TSA has not yet had an adequate opportunity to review the documents for SSI. This assertion seems incompatible with the Intervenor’s knowledge of TSA involvement in the

criminal proceedings. The TSA has been heavily involved in the Moussaoui trial from the beginning. In 2002, the Government stated that “The United States has recently received a number of responsive documents and items from the [FAA] and the [TSA], including several which are ‘Sensitive Security Information’ and are the subject of this motion” and that “The United States has at present identified the following SSI materials for potential production in discovery.” Government’s Response to Standby Counsel’s Pleading Regarding Discovery, Docket #339, filed July 16, 2002. In addition, there have been numerous CIPA hearings conducted throughout the course of the litigation at which the Government has had the opportunity to review, substitute or object to the use of classified information made public at the trial. According to the U.S. Attorneys’ Manual, by the time of the CIPA § 4 proceeding, the prosecutor should have completed the government’s review of any classified material and have identified any such material that is arguably subject to the government’s discovery obligation. Those CIPA procedures are essentially the same procedures used for handling classified information in civil trials brought by the Government pursuant to 18 U.S.C. § 2339B.

The TSA has played an important role in the classification process, including being present at CIPA hearings, from the beginning. *See* Transcript from March 21, 2006, hearing (“this is a lady [Carla Martin, TSA Lawyer] who comes to the CIPA hearings. This is a person who has been involved in this case from the beginning”). Your Honor noted at a hearing on March 14, 2006, that “Ms. Martin appears to have been the key contact person between the prosecution team and the TSA-FAA component in terms of getting documents and that sort of thing...involved in a significant portion of your case...included on some of your pleadings to this Court...cc’d on some of the letters that you all were sending to the defense team...she obviously was the liaison for the production of documents” Mar. 14, 2006 Tr. at 201-202. Then

again at a March 21, 2006, hearing the Court commented “I’ve got a lawyer [Carla Martin, TSA Lawyer] here who was charged with a great deal of responsibility...in working with the aviation portion of the this case...she was involved in getting documents to witnesses, presenting witnesses with documents to see whether they should be declassified.” Mar. 21, 2006 Tr. at 13. In discussing a certain category of documents U.S. Attorney David Raskin once commented that “Part of our comfort here...is that there has been such great coverage of this topic by other investigatory bodies,² it is highly unlikely that there is a document out there that would be in any way material to this case that has not been poured over time and time again.” March 14, 2006 Tr. at 202. Simply put, enough is enough.

Even if the Government had not reviewed all of the documents for SSI and classified information before producing them back in 2002, the Government argues now to this Court that in the intervening four years, there has been no review of these documents to determine whether any should be classified or denoted as SSI. The Government admits in their memorandum of law that 9/11 was the largest criminal investigation in our nation’s history and the Moussaoui case is the only criminal trial related to 9/11, yet the Government contends that “[t]he Government never contemplated that this material would be disclosed more widely for use in private civil litigation.” Memorandum at 2-3. Judge Hellerstein remarked regarding the TSA’s stall tactics that “I think it is cruel and inhuman to the people involved. There are people involved. This is not a lawyers’ and judge’s game.” Nov. 18, 2005 Tr. at 33. He has commented that “What is happening now is there is an impediment in the movement caused by the TSA. It is not tolerable that this situation is dillydallied with by all kinds of effort...It is like

² These “investigatory bodies” would include, but not be limited to, the National Commission on Terrorist Attacks Upon the United States (the “9/11 Commission”) and the Joint House/Senate Congressional Inquiry into the September 11, 2001 Terrorist Attacks; the TSA provided tens of thousands of pages of documents, videos, training films and witness statements to both of these investigative bodies even redacting certain documents from the final publication.

we are trying to spin our wheels to get out of a desperate muddy, frozen situation. The harder we spin, the more we work, the less progress we make. It is not tolerable.” *Id* at 34.

Your Honor noted at the April 7 hearing “we don't play games down here...I don't see a principled reason why unclassified information cannot be made available to the counsel.” Tr. at 26. The Government's stall techniques must be stopped. In short, the Government has had numerous opportunities to review, substitute, or object to the use of classified information made public in the trial. A prime example of the games played by the TSA is seen in its reactions to the release of security camera footage from Dulles International Airport from September 11, 2001. The TSA has insisted that this video constitutes SSI in the New York litigation while allowing its admission into evidence in Moussaoui's trial in this Court. *See also* Argument Section 4.B., *infra*, for additional information regarding the Dulles security video. To claim this information was not properly reviewed because the Government did not contemplate its use for civil litigation is seemingly beyond the pale.³

B. There is No Distinction Between the Treatment of SSI In Civil v. Criminal Cases Under the Regulations

The SSI Regulations do not distinguish between cases involving criminal discovery and cases involving “civil discovery.” The issue before this Court has nothing to do with “civil discovery” but rather it deals with issue of access to unclassified information. But, the SSI Regulations unequivocally list those individuals who are entitled to receive SSI and also specifically set out those individuals who are “covered persons” and, therefore, are duty bound to protect SSI from being disclosed. Nowhere in the Regulations does it say that a criminal defendant, or his attorneys, is entitled to see SSI under any conditions. In fact, the Government has expressed to this Court its belief that criminal defendants are not entitled to higher levels of

³ The TSA voluntarily released to the public the Portland, Maine checkpoint video. What is the difference between these tapes which justifies this governmental duplicity?

sensitive information than civil litigants: “Members of the public including plaintiffs in civil litigation, proceeding *pro se* or otherwise, and defendants in criminal cases do not fall within this ‘need to know’ category. 49 C.F.R. § 1520.5(b).” Government’s Motion for a Protective Order Prohibiting Disclosure of Sensitive Aviation Security Information to Defendant, Docket #174, filed on June 11, 2002. The Government, understandably, asserts that:

the disclosure of any aviation security documents or information to this defendant would unacceptably increase the risk to the traveling public...Given the fact that civil airliners were used as weapons against the United States on September 11, and that the *defendant* has been charged as a co-conspirator in those attacks, common sense dictates that it is clearly not in the national interest for such disclosure to occur.

Id. Therefore, none of the information that was provided to Moussaoui himself could possibly have contained SSI. Furthermore, Standby Counsel for Moussaoui signed protective orders in order to obtain access to these documents. The Intervenor in this case again express their agreement and willingness to be bound by the same or similar protective orders pertaining to the release of documents.

By early in 2002, Standby Counsel for Moussaoui had already been given “hundreds of thousands of documents in CD-ROM format.” Response to Defendant Moussaoui’s Discovery Motion Directed to Standby Counsel, Docket #304, dated July 10, 2002. Moussaoui filed a motion in 2002, after the Protective Order sought by the Government cited above had been entered, requesting that documents which have been provided to him on CD-ROM be sent to him in paper format instead. His counsel filed a response to that motion noting that what “Mr. Moussaoui requests would leave no room for Mr. Moussaoui in his cell or in the cell where he has his computer and might even consume the entire jail.” *Id.* They go on to point out that since his motion was filed, they “have delivered an additional 952 CD-ROMS (approximately) to Mr. Moussaoui to supplement hundreds that he already has. This results in him having all the

document discovery, except classified discovery, that has been produced by the government to date.” *Id.*

At a minimum, the “hundreds of thousands of pages” of documents contained on the “hundreds” of CD-ROMS provided to counsel for Moussaoui to be delivered to Moussaoui himself for review in his jail cell must first have been reviewed by the government for classified information and for SSI before they were sent to Moussaoui himself. The Government scoffs at the Victims’ Rights Statute admitting first that it provides Victims with a general right “to be ‘treated with fairness and with respect for the victim’s dignity and privacy’” and then stating that “Nothing in our position here is in any way inconsistent with that obviously laudable requirement.” Memorandum at 12. Now the Government comes before this Court and asserts that much of the unclassified/non-SSI criminal discovery material potentially would be covered by “various statutory privileges”; that “those documents include sensitive and otherwise privileged information and would have to be carefully reviewed by the respective agencies prior to any production to Intervenors”; that “some of the documents provided to the prosecution team by the FBI may contain SSI even if not marked as such”; and even that “such documents were not submitted to the TSA for SSI review before being given to defense counsel under the general discovery protective order.” *See* Memorandum at 19-20. The Government’s stall techniques hardly treat the victims “with fairness and with respect for the victim’s dignity.”

IV. The Government Has Grossly Mischaracterized and Misrepresented the Intervenor's Motivations Regarding Access to the Requested Documents and the Status of Discovery Proceedings in the Southern District of New York

A. Intervenor's Have Sought Extensive Discovery From the Government in the September 11 Litigation

In its Memorandum, the government goes so far as to suggest that "Intervenor's have sought almost no discovery from the Government in either the September 11 Litigation or the Terrorist Litigation." The Government goes on to assert that "they [Intervenor's] have not sought any discovery from the Government, whether involving SSI or any other matter, with the exception of a single subpoena directed to the United States Postal Service dated April 13, 2006, after this Court's April 7 Order." In regards to the terrorism related litigation, the Government similarly asserts that "Likewise, with one possible exception, Intervenor's have not sought any third-party discovery from the Government in the Terrorist Litigation." Memorandum at 6-7. The Government says flat out that "Intervenor's have not made any effort to obtain this information in the normal course of civil discovery in the September 11 or Terrorist Litigations." (citation omitted). Memorandum at 17. First of all, Intervenor's contend that is completely irrelevant to the issue at hand. That being said, however, these contentions by the Government are gross mischaracterizations and distortions of the truth. What the Government fails to tell this Court is that the reason more discovery has not been sought is mostly due to its actions. As Judge Hellerstein himself noted in a recent opinion: "In setting forth its approach to disclosure of SSI information for purposes of the instant litigation, TSA initially took the position that all SSI-related discovery requests should be stayed pending narrowing of the issues relevant to the September 11 litigation by motion practice." *In re September 11 Litigation*, 2006 WL 846346, at *2 (S.D.N.Y. Mar. 31, 2006). Originally, after the TSA intervened in the September 11 litigation, it agreed to a procedure for clearing a limited number of Plaintiff's lawyers to allow

them to review documents. However as Judge Hellerstein pointed out “two years after its intervention, TSA retreated from its initial position and determined that it would not allow for conditional disclosure of material containing SSI to a small group of cleared Plaintiffs’ attorneys.” *Id.*, at *3.

As a result of that decision by the TSA, the Plaintiffs’ attorneys were in a difficult position: “although defendants’ attorneys were privy to SSI coming from their respective clients’ files, and perhaps from co-defendants’ files, plaintiffs’ attorneys were barred from seeing or hearing information deemed to constitute SSI and thereby, despite representing people whom Congress had acknowledged as having the right to sue, became ineligible effectively to represent their clients in such suits.” *Id.* “Finding that further delay was not tolerable, I suggested to plaintiffs that they notice depositions, forcing TSA to make its orders in the forms of directions to witnesses not to answer....” *Id.*, at *4.

Contrary to what the Government would have this Court believe, Plaintiffs have filed scores of Freedom of Information Act (“FOIA”) requests pursuant to 5 U.S.C. § 552. Since October 2002, Victim-Intervenors have served approximately one-hundred and thirty-seven (137) FOIA requests on thirty-four (34) federal agencies, offices, and presidential libraries. These requests encompass the categories of discovery enumerated in Exhibit 1 of Victim-Intervenors’ Proposed Protocol and Categories of Evidence Sought from the United States Government.

Of the total number of requests served to date, sixty-six (66) remain pending, including some petitions filed in 2002-2003. Thirty-one (31) have been denied outright, while twenty-five (25) failed to garner any kind of Government response. Twelve (12) requests resulted in the production of documents, although several responses fell short in terms of comprehensiveness

and applicability to the initial query. An October 2005 request to the Transportation Security Administration (“TSA”) concerning a proposed 1994 ban on certain knives and blades, for example, resulted in the production of one entirely unrelated page with no identifying source information.

Despite the Intervenor’s pursuit of all administrative remedies available to them under FOIA, the Government remains unresponsive. In one particularly absurd example, Intervenor requested FBI files for Niaz Khan in June 2004. Mr. Khan turned himself into the FBI in March 2000, having arrived in the United States after undergoing hijacker training in Pakistan. His questioning, conducted by FBI agents and verified by polygraph, produced several FD-302s and ECs similar in nature to the discovery at issue. After Intervenor amended their request with a written waiver from Mr. Khan himself in light of 5 U.S.C. § 552(b)(6), the FBI entered a negative determination on grounds that release of such information would interfere with enforcement proceedings. 5 U.S.C. § 552(b)(7)(a). Despite the Justice Department’s decision on remand that this exemption no longer applied, the FBI again denied Intervenor’s request, stating that **no** responsive documents existed. Intervenor await the results of their third appeal, which incorporated the affidavit of an FBI agent assigned to Mr. Khan’s case affirming the existence and location of the records in question. Indeed, Intervenor are in possession of said documents and have located and interviewed both the Al Qaeda-trained hijacker Khan and his FBI interviewer. Amazingly, Intervenor believe that these files may be among the 160,000 FBI ECs provided by the Government to Zacarias Moussaoui. Moussaoui stated in one of his *pro se* filings that the “FBI’s Newark office must produce to Zacarias Moussaoui the “walk in” source Brady Material without anymore Delay [sic].” See Motion filed by Zacarias Moussaoui, “9/11 WTC Strike!!!,” Docket #1027. Here again the Government appears to have no qualms with

sharing law enforcement information with a 9/11 conspirator, but has gone to great lengths to obstruct the release of the same information to victims and their families.

In some instances, agency stonewalling has forced Plaintiffs to forego administrative appeals and bring their grievances directly to the Courts. Plaintiffs in both cases served a FOIA request upon the National Safety Transportation Board (“NTSB”) in September 2004 seeking reports, flight data recorder information and cockpit voice runs from the four flights hijacked on September 11. Since acknowledging the letter in October 2004, the NTSB has provided no further response to Plaintiffs. After several failed attempts to communicate with NTSB’s FOIA staff and counsel in February 2006, Plaintiff Mike Low, who testified before this Court on April 6, brought suit against the NTSB in the Southern District of New York. *See Low v. National Transportation Safety Board*, 06 CV 2990.

B. The TSA’s Prophylactic Use of SSI Designations to Prevent Disclosure to Intervenor

Another overriding issue regarding the Intervenor’s position rests on the TSA’s insistence that virtually everything pertaining to the aviation industry before and after September 11, 2001 constitutes SSI and is not releasable – even subject to proper protections. Pointing out the problems that the TSA has identifying and classifying SSI, Mr. Novak remarked to this Court that he had “leaped over Ms. Martin to DHS (Department of Homeland Security) and had DHS people talk to the actual security people to get the answers.” Mar. 21, 2006 Tr. at 37. According to Mr. Novak “we [TSA] were basically told, look, the whole item is SSI.” *Id.* The TSA’s direction to Mr. Novak and the prosecution lawyers is directly contrary to a specific direction from Congress to identify paragraph-by-paragraph what is SSI. See Conference Report 109-241 at 37 (Conference Report to accompany H.R. 2360, “Making Appropriations for the Department of Homeland Security for the Fiscal Year Ending September 30, 2006, and for other purposes.”)

In that report, Congress specifically directed the TSA to ensure that classified and SSI documents were clearly identified in a paragraph-by-paragraph manner, which paragraphs contain classified information and which do not. "This is consistent with actions taken by other federal agencies." The unreasonableness of the TSA's position was summed up further when Mr. Novak went on to note on that same day in Court "some of this stuff from back in 1995, 1996, '97, '98, the one about KSM, the one that you said had to go in the fact that it had his picture and his name and all that type of stuff, there can't be a threat to ongoing airline security...." Mar. 21, 2006 Tr. at 36-37.

This is consistent with the GAO Report issued in June of 2005 which found that TSA had no clear SSI designation policies and procedures, that TSA has no monitoring controls on SSI designations, and that TSA has insufficient training for employees on SSI designation. *See GAO, Report to Congressional Requesters, June 2005, TSA, Clear Policies and Oversight Needed for Desingation of Sensitive Security Information, (GAO-05-677).* The Information Security Oversight Office Completed the Report on its Audit of this Country's classification system. The ISOO found the following:

This audit identified a significant number of withdrawal actions for classification purposes as inappropriate. Of the records sampled to date, 24 percent were clearly inappropriate and 12 percent were questionable. In most of the agency re-reviews examined by this audit, records were inappropriately removed from the public access at the National Archives. In one case (the CIA re-review of the INR collection), 32 percent of the sample of withdrawals classification purposes clearly did not satisfy the standards for continued classification under the Order, while an additional 18 percent were questionable.

AUDIT REPORT: Withdrawal of Records from Public Access at the National Archives and Records Administrations for Classification Purposes, Prepared by: Information Security Oversight Office ("IISO"), April 26, 2006, at pp. 18-19. A spokeswoman for the National Archives commented that "This report confirms our fears that some Executive Branch agencies

are willing to pour taxpayer dollars into efforts to control all information for all time without considering whether it is necessary or even feasible.” ISOO Audit Report Exposes Abuse of Classification System. April 26, 2006. In fact, the ISOO went so far as to make an official recommendation that: “*Agencies and NARA must develop and implement a strategy that will result in the prompt return to public access those records withdrawn to date that are not appropriate for classification.*” *Id.* at 19.

Standby Counsel in this case at one point in 2002 complained that its use of “sensitive but not classified information” was severely restricted due to a February 2002 protective order. Information covered by the protective order was likely to become public in the Joint Inquiry public hearings. The defense asked that the protective order be thrown out given the likely public disclosures and sought guidance from the Judge who held a hearing on the issue in August 29, 2002. During that hearing, the Court noted the incoherence of the TSA’s SSI concerns: “I think the Justice Department has put itself in a difficult position, because on the one hand, you’re asking the Court to restrict or in some cases seal the information which other members of the Justice Department are clearly putting out in the public record.” Aug. 29, 2002, Tr. at 8. The Court pointed out the fact that although the Court was faced with a pending motion by the government to continue to maintain the Flight 93 cockpit recordings under seal the Government submitted the proposed testimony of Mr. Mueller, and Your Honor stated that “I feel he goes into significant detail about the very contents of those recordings.” *Id.* As Your Honor correctly pointed out “the Justice Department cannot at one point be asking the Court to seal information and at the same time the same department is giving that information out in manners which get it into the public record.” *Id.* In his defense, Mr. Spencer actually stressed that “The primary reason we asked for the protective order that governs sensitive but unclassified material is to

protect ongoing investigative efforts, and that's the sole reason for asking for that." Aug. 29, 2002, Tr. at 9. In essence he admitted that the driving factor was not any claimed potential danger to the safety of the transportation industry which could result from the leak of the tape despite the fact that that is the only time the TSA is supposed to declare something SSI. Mr. Novak noted that "the cockpit recordings on [UAL} Flight 93 are...governed by the Code of Federal Regulations." *Id.* The Court quickly responded that:

There's statutory authority for that, yes; I agree with that. But still, if the Justice Department is basically paraphrasing portions of those transcripts, I don't see how you can properly in a principled manner stand up and say, well, we want to use this information in a public context in certain respects but not in others. It's – I don't think you can do that. I think the government – the Justice Department, in essence, is waiving the legitimacy of that argument because of the way in which you're proceeding in other fora.

Aug. 29, 2002, Tr. at 9-10.

The Court later noted that "either the Justice Department will have a consistent approach that these are very sensitive and they're not going to be publicly disseminated outside of a very restrictive context, or they're open (Aug. 29, 2002, Tr. at 21), and "if you have NSA or CIA people publicly divulging at these hearings information that you're calling classified that these attorneys can't work with in a fairly unfettered manner, now that again is inconsistent."

Intervenors had a similar experience with the TSA regarding the Dulles tapes as well. Shortly after the Dulles tapes aired on the major news networks, on July 21, 2004, the TSA itself admitted that airport security after 9/11 received a tremendous overhaul. In a press release regarding the Dulles checkpoint video, the TSA noted that "This videotape demonstrates the inadequate security procedures in the pre-9/11 era. Moreover, it strongly validates the dramatic changes that TSA has made in the world of aviation security." Despite publicly admitting that the security in place at Dulles was totally revamped and implying that the release of the tapes in no way would jeopardize the "safety of air travel," on July 28, 2004, just a week later, the TSA

wrote a letter proclaiming that: “The Dulles checkpoint video constitutes Sensitive Security Information (‘SSI’), access to which is regulated by 49 C.F.R. § 1520.” The video was not marked SSI as required by TSA Regulations.⁴

Based on the examples set forth above in conjunction with the Government’s own misgivings regarding TSA’s SSI designation process, the TSA must not be allowed to hide beyond SSI as justification for not turning over the documents to the victims. This court commented several times at the April 7 hearing on how disturbing the Government’s attempt to cover up information was:

- “I’ve always been troubled by the degree to which our government keeps things secret from the American people.” Tr. at 22.
- “I’ve often been surprised by the amount of things that have had to be kept secret, and it has been frustrating beyond belief as a judge.” Tr. at 23.
- “It makes it very difficult to work as a judge or a lawyer in that kind of system, and I think we have to be very careful as a nation not to become so overwhelmed with the need for secrecy that we lose some of what are very much core values, among other things, values that even in our Constitution about open trials and public access.” Tr. at 23.

Ms. Goldman argued that “I want Your Honor to understand that it’s not being done just to keep people from seeing these. It’s being done in order to protect the security of transportation.” As Your Honor pointed out however, “it is also amazing what some agencies think is secret or sensitive...And again, as a culture, we need to be careful not to become so in love with secrecy that we wind up losing what are core values of the way we run things in this government.” Tr. at 34-35. The question arises whether aviation security has been upgraded to the extent boasted by the TSA in its press release of July 21, 2004, or is the United States public still at the level of peril which clearly existed prior to September 11, 2001? As Mr. Motley,

⁴ The TSA’s position is so patently offensive to the Victim Rights Act and common sense itself, having orchestrated the public airing by trial testimony of the entire AVSEC procedures existent on September 11, 2001, and trumpeted the total subsequent revamping of same. The TSA now belatedly seeks to replace the toothpaste into the tube.

counsel for the Intervenors said at that same hearing: “We’re here to vindicate what we believe that Congress has empowered our clients to do, and that is, Your Honor, to have access under the same strictures as defense counsel to all of the government’s information they turned over to the defense counsel in the, in the various discovery procedures ongoing over time.” Tr. at 10. Moreover, the Intervenors limited the requests to those materials not designated as classified or SSI. The Government now inappropriately seeks the opportunity to re-classify documents post hoc. The Court should refuse this request. Intervenors once again assert that they will agree to be bound by the same or similar protective orders as those entered into between the Government and Standby Counsel for Moussaoui in order to facilitate access to the non-classified and non-SSI evidence produced to Moussaoui in this criminal prosecution.

CONCLUSION

For the foregoing reasons, the Intervenor request that the Government's Motion for Reconsideration of the Court's April 7, 2006 Order Granting Intervenor Access to Discovery Produced to Defense Counsel in this Case Pursuant to Protective Orders be DENIED.

Dated: May 5, 2006

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Marvila S. Arevalo, hereby certify that I am over the age of 18 years, am employed by the law firm of Williams Mullen, A Professional Corporation and that, on May 5, 2006, I served INTERVENORS OPPOSITION TO THE GOVERNMENT'S MOTION FOR RECONSIDERATION OF THE COURT'S APRIL 7, 2006 ORDER GRANTING INTERVENORS ACCESS TO DISCOVERY PRODUCED TO DEFENSE COUNSEL IN THIS CASE PURSUANT TO PROTECTIVE ORDERS upon the following by depositing a true and correct copy in the United States Mail, first class postage fully prepaid, addressed as follows:

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